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No. 87-1173

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

APPLICATION OF ADIRONDACK CHAIR CO., INC.,

Appellant,

-against-

COMMISSIONER OF FINANCE OF THE CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

MOTION TO DISMISS

PETER L. ZIMROTH
Corporation Counsel
of the City of New York
Attorney for Appellee
100 Church Street
New York, N.Y. 10007
(212) 566-4178

EDITH I. SPIVACK,
GLENN NEWMAN,
STANLEY BUCHSBAUM,
ANSHEL DAVID,

of Counsel.

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Appellee moves to dismiss this appeal because of the absence of any federal question or on the ground that none of the questions in the Jurisdictional Statement presents a substantial federal question.

PRELIMINARY STATEMENT

This appeal is from an order of the Appellate Division of the Supreme Court, First Department, of the State of New York, dated and entered April 9, 1987, which confirmed the determination of appellee Commissioner of Finance of the City of New York (15a-16a)*. By order entered October 15, 1987, the Court of Appeals denied appellant's motion for leave to appeal to that Court (17a).

The order confirmed a tax determination based on a hearing officer's report which found that appellant did not have a regular place of business outside New York City.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the New York City General Corporation Tax law and New York

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* Rferences in parentheses are to pages in Appellant's Jurisdictional Statement.

State enabling legislation authorizing it appear at pp. 1a-5a of the Jurisdictional Statement. The New York City regulation, General Corporation Tax Regulation 4-11(b), which provides that a warehouse outside the City regularly used by the taxpayer shall constitute a regular place of business, appears at p.6.

STATEMENT OF THE CASE

(1) Notice of deficiency.

On September 2, 1983, the Department of Finance issued to appellant a Notice of Determination asserting a deficiency in New York City General Corporation Tax in the principal amount of $79,116.07, plus interest, for the period from October 1, 1978 through December 31, 1981. The deficiency resulted from disallowance of appellant's allocation of a portion of its net income outside of New York City.

As provided by statute, an evidentiary hearing on the deficiency was held before a

referee designated by appellee, the City's Commissioner of Finance.

(2) The evidence presented at the hearing before respondent.

Appellant's evidence established that: a) it was in the business of selling office furniture by catalog to mail order customers; b) its sole office was in New York City; c) it had no employees outside New York City; d) it did not hold itself out as doing business at any location outside the City; and e) it paid no state or local taxes outside New York.

All the furniture sold by appellant was manufactured by its two out-of-city suppliers. Overman, USA, was located in Knoxville Tennessee. The other, of which appellant was a subsidiary, Krueger Metal Products, Inc., was located in Green Bay, Wisconsin and Tupelo, Mississippi. Appellant's evidence in regard to Overman related to the entire audit period. Its evidence with regard to Krueger, however,

related only to November and December of 1981, the final two months of the thirty-nine month audit period.

Appellant's claim that it was entitled to allocate income outside the City was based on its purchases "for stock" from its two suppliers. The evidence showed that payments were made to the suppliers for certain items which were specified by description and model number. Those items were not shipped at the time of payment, but were listed by both appellant and supplier as items of appellant's "inventory" held by the supplier. From time to time, appellant would transmit customer orders for "inventory" items to the suppliers, who would thereupon ship the specified item directly to appellant's customer at no additional cost to appellant.

Appellant made no claim that its "inventory" goods were identified or segregated from the other merchandise of either of its suppliers at any time prior to shipment to appellant's

customers. Indeed, appellant's corporate treasurer, its sole witness, testified that he was unaware of any segregation of appellant's merchandise at the Overman plant. (This testimony appears at pp. 133-34 of the Record on Review that was before the Appellate Division.) No payments were made to Overman for use of any storage facilities and there was no evidence that Overman set aside any identifiable space for storage of appellant's merchandise.

Appellant did make payments for use of a storage bay at the Krueger warehouse in Tupelo for November and December of 1981. No such evidence was submitted for any earlier period. The storage bay was denominated the "Adirondack Storage Bay" in the invoices submitted by Krueger to petitioner. However, as in the case of Overman, there was no direct evidence of identification or segregation of specific goods.

(3) Respondent's findings and conclusions.

Based on the foregoing evidence, the City's Commissioner of Finance concluded that appellant was not entitled to allocate income to either of its suppliers' warehouses outside New York City. The written decision of the hearing officer appears at pp. 9a-15a of the Jurisdictional Statement. As to Overman, he found (12a, ¶12):

> [Appellant] failed to adduce any evidence that the merchandise purchased from Overman was stored in space rented by [appellant] or that the merchandise was otherwise kept separate or identifiable.

Similarly, as to Krueger, he found (12a, ¶13):

> No lease agreement or storage agreement concerning the Tupelo location was produced at the hearing. There is no indication that [appellant] had separate space or that its goods were kept separate or were otherwise identifiable. Nor is there any indication that [appellant], in November or December 1981, had the exclusive right to, or exercised any control over,

> specific space in Krueger's plant.

The hearing officer further concluded as to Krueger, that appellant's payments for use of a storage bay in November and December of 1981 were insufficient to establish regular use of a warehouse during 1981 (13a, ¶E).

Finally, he found that (12a,¶15):

> [Appellant] did not introduce any evidence that it filed business tax returns or paid tax in any jurisdiction outside of New York, or that it held itself out as doing business in any location other than New York City.

In light of the foregoing findings, the Commissioner of Finance concluded that appellant did not regularly use a warehouse outside the City within the meaning of General Corporation Tax Regulation 4-11(b) and, therefore, assessed appellant for the tax deficiency asserted in the Notice of Determination (13a, ¶¶ D,E,F,G).

The Appellate Division of the Supreme Court, First Department, confirmed the

Commissioner's determination (15a-16a). Appellant then made an application to the Court of Appeals for leave to appeal to that Court. The motion was denied (17a).*

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* It should be noted that the appellant made no attempt to appeal as of right to the New York Court of Appeals although the governing law authorizes such an appeal in a case "where there is directly involved the construction of the constitution of the state or of the United States." New York Civil Practice Law and Rules, §5601(b)(1).

ARGUMENT

JURISDICTION IS LACKING BECAUSE THE RECORD FAILS TO DEMONSTRATE THAT THE NEW YORK COURTS DECIDED THE FEDERAL ISSUE RAISED BY APPELLANT.

(1)

Appellant is challenging a tax determination of the Commissioner of Finance, rendered after an evidentiary hearing, which denied it the right to allocate corporate net income outside New York City pursuant to the City's General Corporation Tax statute and pertinent regulations. The statute permits allocation of income only where the taxpayer has "a regular place of business outside the City." The regulations provided that a warehouse "regularly used" by the taxpayer may constitute a regular place of business for allocation purposes. Appellant sought to allocate income on the basis of assertions that it regularly maintained stocks of merchandise outside the

City. The hearing officer rendered a written decision which was confirmed without opinion by the Appellate Division. The Court of Appeals denied appellant's motion for leave to appeal without opinion.

Appellant does not now challenge the facial constitutionality of either the statute or the regulation applicable to warehouses. Rather, it bases this appeal on a statement appearing in the Conclusions of Law in this case that (13a, ¶D):

> where the warehousing of finished goods outside New York City is the basis upon which allocation of business income is premised, the warehousing activities must occur either at a site maintained by the taxpayer itself or in a public warehouse.

Appellant asserts that this formulation requires that the taxpayer perform affirmative acts with respect to the warehouse site beyond mere "regular use" and that such a requirement

contravenes the commerce and equal protection clauses.

(2)

Appellant fails to demonstrate that the New York courts, in sustaining the tax determination, endorsed the foregoing formulation of the meaning of the regulation as set forth in the Conclusions of Law. On the contrary, the record clearly shows that there is little likelihood the New York courts addressed this issue.

The findings of fact, which were part of the written decision, all indicate that appellant failed to establish its factual claim that it maintained merchandise at its suppliers' locations outside the City. The Commissioner found that appellant's suppliers did not separately identify or segregate specific items of merchandise as appellant's inventory, that the suppliers did not regularly set aside specific spaces for storage of appellant's goods, and that appellant did not regularly make rental payments for storage space

at the suppliers' locations. In addition, the Commissioner found that appellant paid no taxes in Tennessee or Mississippi, where the suppliers were located, even though both states had corporate franchise taxes which would have been applicable. On the basis of these findings, which were fully supported by the evidence in the record, the Commissioner of Finance concluded that appellant did not have any regular places of business outside the City.

The sole argument in our brief before the Appellate Division was that the administrative determination must be sustained because the factual findings, which were undisputed, clearly established that appellant did not maintain any inventories outside the City. Our brief expressly argued that it was unnecessary for the courts to address appellant's federal constitutional claims. In light of the factual findings, substantiated by the lack of evidence to the contrary, appellant could not be found to

have a regular place of business outside the City under any possible interpretation of the governing regulation. In view of this state of facts there is no valid ground for appellant's argument in its Jurisdictional Statement that the New York courts based their decisions on a constitutionally impermissible distinction between different types of warehouses.

Thus, this case must be dismissed for lack of jurisdiction since the record fails to establish that the issue presented for review by appellant was decided by the courts of New York State. 28 U.S.C. §1257; Exxon Corp. v. Eagerton, 462 U.S. 183 (1983); Street v. New York, 394 U.S. 576, 581-82 (1969); Cardinale v. Louisiana, 394 U.S. 437, 438 (1969); Bailey v. Anderson, 326 U.S. 203, 206-07 (1945); Whitney v. California, 274 U.S. 357 (1927).

Conclusion

The appeal should be dismissed for want of a substantial federal question.

Dated: March 4, 1988

Respectfully submitted,

PETER L. ZIMROTH,
Counsel for Appellee,
Corporation Counsel of
the City of New York.

EDITH I. SPIVACK,
GLENN NEWMAN,
STANLEY BUCHSBAUM,
ANSHEL DAVID,

of Counsel.